IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ESTATE DUTY REFERENCE No 2 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes : YES

2. To be referred to the Reporter or not? No :

3. Whether Their Lordships wish to see the fair copy of the judgement? No : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No : NO

5. Whether it is to be circulated to the Civil Judge? No :

LATE NAGINDAS N MODI

Versus

CONTROLLER OF ESTATE DUTY

Appearance:
MR BD KARIA for Petitioner
MR AKIL KURESHI for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 11/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

At the instance of the accountable person, in the matter of Late Shri Nagindas N. Modi, who expired on

December 16, 1979, following two questions of law arising out of EDA No.1/Ahd/1984 in the proceedings under the Estate Duty Act, have been referred to this Court by the Income Tax Appellate Tribunal, Ahmedabad Bench 'A' along with the statement of the case :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that only provisions of Sections 6 and 7 would be attracted and that the same have to be applied without bringing in the provisions of section 39 of the Estate Duty Act, 1953 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the deeming provisions of partition contemplated under section 39(1) of the Estate Duty Act, 1953 would be attracted only in cases where a normal partition under Hindu law could/would take place ?

2. FACTS :-

The family of the deceased consisted of himself and his wife. The deceased had no son. The H.U.F. of the deceased and his wife owned certain properties. In the estate duty, return as well as at the time of the assessment proceedings, the accountable person claimed that only the value of 1/2 interest of the deceased in the HUF properties would be includible in the principal value of the estate left by the deceased. The Assistant Controller of Estate Duty, however, did not accept the stand taken on behalf of the accountable person. He held that since the deceased was the sole surviving coparcener, he was competent to dispose of the entire property and, therefore, his whole estate passed on his death to his widow. In view of this conclusion, he added the entire HUF property left by the deceased for the purpose of charging estate duty. In appeal before the Controller of Estate Duty (Appeals), the accountable person relying on the provisions of sections 7 & 39 of the Estate Duty Act as well as decisions rendered in the cases of (1) Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum and others, (1981) 129 ITR 440, (2) Gowli Buddanna v. Commissioner of Income-tax, Mysore, (1966) 60 ITR 293, (3) N.V.Narendranath v. Commissioner of Wealth-tax, Andhra Pradesh, (1969) 74 ITR 190, (4) Surjit Lal Chhabda v. Commissioner of Income-tax, Bombay, (1975) 101 ITR 776, (5) Smt. Dhanidevi Jhavermal

89 ITR 96, (6) Satyanarayan Saraf v. Assistant Controller, "A" Ward, Estate Duty-cum-Income-tax Circle, (1978) 111 ITR 432 and order of the Tribunal in case of Radheshyam, 18 CTR 9, urged that only the value of 1/2 share of interest in the HUF properties should have been included in the principal value of estate left by the deceased. Accepting the submissions made on behalf of the accountable person, the Controller of Estate Duty directed the Assistant Controller of Estate Duty to include only the value of 1/2 share of HUF estate in the dutiable estate. Feeling aggrieved by the order of the Controller, the Revenue preferred EDA No.1/Ahd/1984 before Income Tax Appellate Tribunal, Ahmedabad Bench 'A'. The Tribunal found that it was not in dispute that the deceased's family consisted of himself and his wife

and that neither during his life time, nor after his death, a son was adopted in his family. In view of these facts, the Tribunal agreed with the submissions made on behalf of the Revenue that the provisions of sections 6 & 7 would be attracted and the same have to be applied without bringing in the provisions of section 39 of the Act. According to the Tribunal, the deeming provision of a partition contemplated under section 39(1) of the Act would be attracted in a case where normal partition under the Hindu law could/would take place and since the deceased and his wife were the only two members in the family and a female member has no right to claim partition, a partition under the Hindu law cannot be visualised. The Tribunal further concluded that a deemed partition under section 39(1) of the Act also cannot be visualised and, therefore, the reported decisions which were relied upon on behalf of the accountable person have no direct application to the facts and circumstances obtaining in the present case. Under the circumstances, the Tribunal by its order which was rendered in the month of October, 1984 allowed the appeal of the Revenue and restored the order of the Assistant Controller of Estate Duty. Thereupon, the accountable person moved Reference Application No. 1056/Ahd/1984 before the Tribunal requesting it to refer the questions of law for consideration of the High Court. On being satisfied that the two questions of law arise for the consideration of the High Court, the Tribunal has referred two questions of law which are quoted above, for consideration of this Court.

3. Mr. B.D.Karia, learned counsel for the accountable person submitted that for the purpose of estate duty it is the deemed partition which has to be

made basis for determination of share of the deceased in the HUF property and as on deemed partition, only 1/2 share in the property owned by HUF had passed on to the widow, estate duty ought to have been worked out accordingly. According to the learned counsel, the deeming provisions of partition contemplated by Explanation-I to Section 6 of the Hindu Succession Act, 1956 as well as section 39 of the Act would be attracted in cases where a normal partition under Hindu law would take place and since the deceased and his wife were the only two persons in the family, she had inherited only 1/2 share of her husband in the properties on deemed partition taking place. What was emphasized by the learned counsel for the accountable person was that on the death of a member of a HUF, for the purpose of estate duty, only the principal value of the share of the deceased in such joint Hindu family property, which would have been allotted to him had there been a partition immediately before his death, should be taken to be the value of his interest in the joint Hindu family property ceasing on death and, therefore, the Tribunal was not right in holding that the whole property left by the deceased was liable to estate duty. In support of his submissions, the learned counsel placed reliance on the decisions in (1) Gurupad Khandappa Masdum v. HIrabhai Khandappa Magdum and others, 129 ITR 440 (SC), (2) Smt. Dhani Devi and Jhavermal v. Controller of Estate Duty, (1973) 89 ITR 96 (Raj.), (3) Controller of Estate Duty, Madras vs. Alladi Kuppuswamy, 108 ITR 439 (SC), (4) Satyanarayan Saraf v. Assistant Controller 'A' Ward, Estate Duty-cum-Income-tax Circle, 111 ITR 432 (Cal.), (5) Vidyaben Wd/o Nandshankar Vishvanath Bhatt v. Jagdishchandra Nandshankar Bhatt and ors. 1973 GLR 328, (6) Controller of Estate Duty v. Smt. Rani Bahu, 142 ITR 843 (M.P.), (7) Bhimraj Saremal v. Controller of Estate Duty, Gujarat, 132 ITR 35 (Guj.), (8) Controller of Estate Duty v. P.S. Chaware, 204 ITR 513 (Bom.) and (9) Controller of Estate Duty v. Som Chand Katia, 234 ITR 42 (P & H).

4. Mr. Akil Kureshi, learned counsel for the Revenue urged that the deeming provision of a partition contemplated under section 39(1) of the Act would be attracted in cases where a normal partition under Hindu law would take place and as the deceased and his wife were the only two members in the family and as a female member has no right to claim partition, the partition neither under section 6 of the Hindu Succession Act nor under section 39(1) of the Act can be visualised and, therefore, various reported decisions which are relied upon on behalf of the accountable person have no direct

application to the facts of the case. The learned counsel for the Revenue pleaded that according to the law of partition as is applicable to coparcenary property, a female in absence of her son or son's son is not entitled to claim or to the allotment of a share solely against her husband if he is a sole surviving coparcener,so far as the branch headed by her husband is concerned and as the sole surviving coparcener enjoys the absolute proprietary rights over the properties of the Hindu undivided family, the view taken by the Tribunal should be upheld. What was asserted was that the deceased was the sole coparcener and his wife - a member of H.U.F. and as there was no other coparcener in his family excepting himself, the entire property should be deemed to have passed on his death for the purposes of estate duty in view of the provisions of section 6 of the Estate Duty Act. It was further stressed that when the entire property vested in the deceased because the deceased was the sole coparcener, there is no question of any person getting any interest or share on a notional division immediately before his death and sections 7 and 39 of the Act have no application to such a case. The learned counsel for the Revenue,therefore, urged that the view taken by the Tribunal is eminently just and the same should be upheld by this Court. In support of his submissions, learned counsel placed reliance on the decisions in (1) Smt. Asha Rani v. Controller of Estate Duty, (1997) 143 CTR 37, (2) Smt. Satya Prema Manjunatha Gowda v. Controller of Estate Duty, (1986) 161 ITR 465 = (1997) 227 ITR 1, and (3) Bharatiben S. Jhaveri v. Controller of Estate Duty, (1999) 238 I.T.R. 995 (Guj.)

OPINION

5. We have heard the learned counsel for the parties. It is not in dispute that the HUF consisted of the deceased and his wife and the deceased had no son. The Hindu Undivided Family as a concept and the coparcenary are not one and the same under the Hindu law, but for the purposes of taxation under the Act, as in other tax measures, like the Income-tax Act, they are treated as one and the same. The question,therefore, is whether the deceased was the owner of the property and had disposing capacity. The deceased was holding the properties without there being any other coparcener. Therefore, it was his individual properties and he had full disposing capacity. Sections 6, 7 & 39 of the Estate Duty Act, 1953 as well as section 6 of the Hindu Succession Act, 1956 which are relevant for the purpose of rendering opinion in the matter, are reproduced below

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"Sec.6 : Property within disposing capacity :
Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death.

Sec.7 : Interest ceasing on death :

(1) Subject to the provisions of this section, property in which the deceased or any other person had an interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, including, in particular, a coparcenary interest in the joint family property of a Hindu family governed by the mitakshara, marumakkattayam or aliyasantana law.

(2) If a member of a Hindu coparcenary governed by the mitakshara school of law dies, then the provisions of sub-s.(1) shall apply with respect to the interest of the deceased in the coparcenary property only :

(a) if the deceased had completed his eighteenth year at the time of his death, or

(b) where he had not completed his eighteenth year at the time of his death, if his father or other male ascendant in the male line was not a coparcener of the same family at the time of his death.

Explanation : Where the deceased was also a member of a sub-coparcenary (within the coparcenary) possessing separate property of its own, the provisions of this sub-section shall have effect separately in respect of the coparcenary and the sub-coparcenary.

(3) If a member of any tarwad or tavazhi governed by the marumakkattayam rule of inheritance of a member of a kutumba or kavaru governed by the aliyasantana rule of inheritance dies, then the provisions of sub-s.(1) shall not apply with respect to the interest of the deceased in the property of the tarwad, tavazhi, kutumba or kavaru, as the case may be, unless the deceased had completed his eighteenth year;

(4) The provisions of sub-section (1) shall not apply to the property in which the deceased or any other person had an interest only as holder of an office or recipient of the benefits of a charity or as a corporation sole.

Explanation : For the removal of doubts, it is hereby declared that the holder of a Sthanam is neither the holder of an office nor a corporation sole within the meaning of this sub-section.

Sec.39 : Valuation of interest in coparcenary property ceasing on death : (1) The value of the benefit accruing or arising from the cesser of a coparcenary interest in any joint family property governed by the mitakshara school of Hindu law which ceases on the death of a member thereof shall be the principal value of the share in the joint family property which would have been allotted to the deceased had there been a partition immediately before his death.

(2) The value of the benefit accruing or arising from the cesser of an interest in the property of a tarwad or tavazhi governed by the murumakkattayam rule of inheritance or of kutumba or kavaru governed by the aliyasanatana rule of inheritance which ceases on the death of a member thereof shall be the principal value of the share in a property of the tarwad or tavazhi or, as the case may be, the kutumba or kavaru which would have been allotted to the deceased had a partition taken place immediately before his death.

(3) For the purpose of estimating the principal value of the joint family property of a Hindu family governed by the mitakshara,murumakkattayam or aliyasanatana law in order to arrive at the share which would have been allotted to the deceased had a partition taken place immediately before his death, the provisions of this Act, so far as may be, shall apply as they would have applied if the whole of the joint family property had belonged to the deceased.

Section 6 of the HIndu Succession Act, 1956 : Devolution of interest in coparcenary property: When a male Hindu dies after the commencement of

this Act, having at the time of his death an interest in a mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class-I to the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1 : For the purposes of this section, the interest of a Hindu mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2 : Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

A bare reading of the above quoted provisions makes it evident that when a male Hindu dies having at the time of his death an interest in a mitakshara coparcenary property, his interest in the property devolves by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Hindu Succession Act, 1956, but if he leaves behind him surviving a female relative specified in class-I of the Schedule, the interest of the deceased in the mitakshara coparcenary property would devolve by testamentary or intestate succession, as the case may be, under the Hindu Succession Act, 1956 and not by survivorship. For the purpose of section 6, the interest of Hindu Mitakshara coparcener has to be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not. This deemed partition would take place provided there is/are other coparcener/s and not otherwise. In the present case, it

is an admitted position that except the deceased, there was no other coparcener in the family and, therefore, it cannot be presumed that a deemed partition of the properties of the deceased had taken place and wife was allotted 1/2 share therein. As per section 6 of the Estate Duty Act, 1953, the property which the deceased was at the time of his death competent to dispose of, should be deemed to have passed on his death; whereas section 7 of the Act provides that the property in which the deceased had an interest ceasing on the death of the deceased should be deemed to pass on his death to the extent to which a benefit accrues or arises by the cesser of such interest. The ownership in the property acquired by the deceased was not shared by his wife although the deceased and his wife constituted an H.U.F. Speaking generally, a female member in an HUF has no ownership in the property belonging to the family. The ownership of such a property is held by a smaller body which is called the coparcenary and in case there is only one coparcener, it is he alone who owns the entire property. As the entire ownership vested in the deceased and as no part of it was shared by the wife who was the only other member in the family, the entire property passed on the death of the deceased within the meaning of section 5 of the Act. The deceased being the sole coparcener had a disposing power and capacity under the Hindu law in respect of the entire property and even under section 6 of the Act, the entire property would be deemed to have passed on his death for the purposes of estate duty. Section 7 which applies when a coparcenary interest in a joint family property ceases on death and section 39(1) which lays down the mode of valuation of such interest, can apply only when the joint family property is vested in more than one person. It is only then that an interest in the joint family property ceases on the death of a coparcener and the valuation of such an interest has to be ascertained on the basis of the principal value of the share which would have been allotted to the deceased had there been a partition before his death. When the entire property vested in the deceased because the deceased was the sole coparcener, there is no question of any other person getting any interest or share on a notional division immediately before his death and sections 7 and 39 have no application to such a case. Though several decisions have been cited at the Bar, we do not propose to refer to all of them, as according to us, the point involved in the present Reference is concluded by the earlier judgment of this Court rendered in BHARTIBEN S. JHAVERI v. CONTROLLER OF ESTATE DUTY, (1999) 238 ITR 995. In the said case, deceased Shri S.P.Jhaveri and his brother Shri J.B.Jhaveri were carrying on the legal

profession in the name and style of 'Ashwin Mehta and Co.' The deceased along with his brother had interest in the coparcenary property of a Hindu Undivided Family. The deceased died issueless leaving behind his widow. In the coparcenary property of which the deceased and his brother were coparceners, the deceased had 1/2 share. The accountable person of the deceased claimed that only 50% of the 1/2 share of the deceased in the coparcenary can be considered for the purpose of determining the principal value of the estate that passed to his heirs. The contention was founded on the basis that the deceased - a male Hindu having left the female heir of class-I in Schedule to Section 8 of the Hindu Succession Act, section 6 of the Hindu Succession Act would operate and it is only to the extent the deceased would have been entitled to a share in the coparcenary property by assuming that a partition had taken place immediately before his death will be the interest of the deceased in the coparcenary that would pass on to the accountable person. According to the case pleaded on behalf of the accountable person, as the wife would have got 1/2 share in the coparcenary interest of her husband, had such partition taken place, the deceased had only 50% of the half share in the coparcenary property, the other half belonging to the brother of the deceased. The Division Bench of this Court has examined the scheme envisaged by Sections 6, 8 & 14 of the Hindu Succession Act, 1956 as well as relevant provisions of the Estate Duty Act, 1953 and held as under :-

"Firstly, a coparcenary is a much narrower body than a Hindu undivided family. A coparcenary consists of such male members only who get interest in ancestral property, which is also termed as coparcenary or unobstructed heritage, by birth; and no male who is removed by four generation in male line of descent from the last holder, or any female in any circumstance, though may be members of the Hindu undivided family, can be member of the coparcenary. Thus a wife, unmarried daughter, daughter-in-law, or other female relative by marriage or by birth in male line of descent and unmarried, though are members of the Hindu undivided family but are not members of coparcenary and do not have any interest in the property of the Hindu undivided family by birth. However, in certain circumstances some of the female members are entitled to be allotted a share in the property of the Hindu undivided family when a partition takes place amongst coparceners. Thus, for the purpose of partition

there must exist two or more coparceners amongst whom partition can take place. A sole surviving coparcener becomes an absolute owner of the property, no one else having a right to claim partition or have a share in the coparcenary property in his hands. In para 217 of Mulla's Hindu Law it has been stated that no female can be a coparcener under the Mitakshara law. Even a wife though she is entitled to maintenance out of her husband's property and has to that extent an interest in his property is not her husband's coparcener. Nor is a mother a coparcener with her sons nor a mother-in-law with her daughter-in-law. Therefore, in the first instance one must conclude that a female is not a coparcener and she does not have by herself a right to claim partition ordinarily, except in case when some interest in coparcenary property passes on to her by way of succession to heir male deceased and she claims right to that. It is also well settled that some of the female relatives who are the heirs of the deceased male are entitled to allotment of share, if the partition takes place. The only female relatives who are entitled to a share in coparcenary property when partition takes place are described in paras 315 to 317 of the aforesaid treatise. They are wife, widow, widowed mother and grand father. All these female members of the family in relation to respective relations have no unqualified right to get share in partition, but in certain circumstances, such female have a right and are entitled to a share if a partition takes place between other members of the coparcenery. With respect to each, one of them law has been stated to be thus :

In relation to wife it has been stated in para 315 that a wife herself cannot demand a partition but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. About widowed mother, law has been stated in para 316. A mother cannot compel a partition so long as the sons remain united. But, if a partition takes place between the sons of her husband,she is entitled to a share equal to that of a son in the coparcenary property. So also the position has been stated in respect of grand mother in para 317. A paternal grand

mother (father's mother) cannot herself demand a partition, but when a partition takes place between her son's sons or between her sons and sons of another predeceased son, she is entitled to a share equal to that of a son in the coparcenary property and she is also entitled to a similar share on partition between the sons and the purchaser of the interest of one or more of them.

Thus according to the law of partition as is applicable to coparcenary property a female in the absence of her son, or son's son, is not entitled to claim or to the allotment of a share solely against her husband if he is a sole surviving coparcener, so far as the branch headed by her husband is concerned. As a matter of fact, the sole surviving coparcener enjoys the absolute proprietary rights over the property of the Hindu Undivided family. When a partition takes place between the respective brothers each brother takes their own share in their own right qua their family consisting of himself and his descendants. In the present case, a partition is deemed to have taken place between the deceased and his brother immediately before the death of the deceased. It would consequently result into a position that the deceased on getting his share in coparcenary interest by severance from his brother became the sole surviving coparcener qua his interest in the coparcenary and no one else had a right to claim partition, nor the property was amenable to partition. Therefore, the question of entitlement or allotment of a share on a deemed partition with his wife would not arise in the case of a sole surviving coparcener for further determining the interest of the deceased in the coparcenary that is deemed to pass on to the accountable person by succession. His entire property including ancestral property will pass on to his heirs. The position would have been different, had the deceased had a male lineal descendant, with whom he would have to partition to determine his interest at the time of death. In that event of such deemed partition between the deceased and his son, the widow too would have got share equal to that of her son.

Therefore, it must be held that though in the absence of other relations of class-I in the Schedule, the widow may be the sole surviving

heir entitled to succeed to the entire estate of the deceased, if he died intestate, because of her presence only the interest of the deceased in coparcenary which shall devolve on her by succession will not diminish. The entire interest of the deceased in the coparcenary will be part of the estate passing on the death of such person."

In view of the aforesaid binding decision of this Court, we are of the opinion that the Tribunal was justified in holding that the entire property left by the deceased passed on his death to the accountable person and was liable to estate duty. Accordingly, the two questions which are referred to us for our opinion, are answered in affirmative i.e. in favour of the Revenue and against the accountable person. The Reference Application is disposed of accordingly, with no order as to costs.

(J.M.Panchal,J.)

(M.S.Shah, J.)

(patel)